

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

With Appendix
74-1344

United States Court of Appeals

FOR THE SECOND CIRCUIT

JOAQUIM CONCEICAO,

Plaintiff-Appellee and Cross-Appellant,

—against—

**NEW JERSEY EXPORT MARINE
CARPENTERS, INC.,**

*Defendant and Third Party
Plaintiff-Appellee,*

and

CIA DE NAV. MAR NETUMAR,

*Defendant and Third Party
Plaintiff-Appellant,*

—against—

**INTERNATIONAL TERMINAL OPERATING
COMPANY, ETC.,**

Third Party Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of New York

**BRIEF FOR PLAINTIFF-APPELLEE AND
CROSS-APPELLANT JOAQUIM CONCEICAO**

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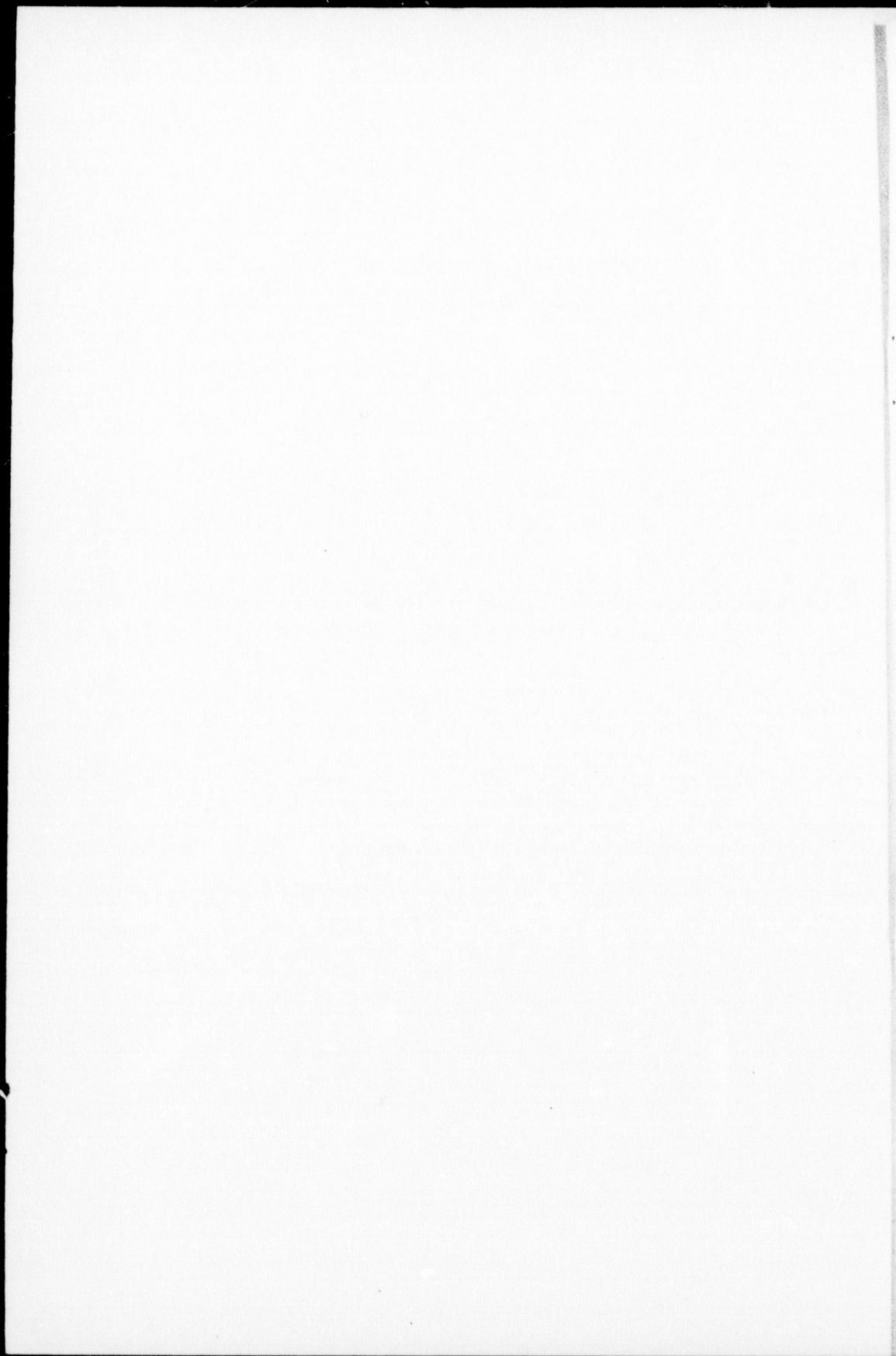


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BRIEF FOR PLAINTIFF-APPELLEE AND CROSS-APPELLANT JOAQUIM CONCEICAO

Statement of Issues for Review

1. Did the jury conclude with reason that the defendant Netumar was negligent?

Statement of the Case

Plaintiff agrees with the Statement by Defendant and Third Party Plaintiff-Appellant of the nature of the case, the course of proceedings, and its disposition in the Court below except where—in the penultimate paragraph (P. 3, appellant's brief)—Judge Ward's decision on the post-trial motions is paraphrased. Judge Ward's decision speaks for itself (457a-460a).

No issue is raised on this appeal concerning the amount of damages awarded to plaintiff, \$42,000.00.

Statement of Facts

Plaintiff, Joaquim Conceicao, sustained injuries on November 5, 1970 while working for third party defendant, International Terminal Operating Company Inc., as a longshoreman. The accident took place about 10:00 A.M. in the morning. He was working aboard the vessel, SS MOSQUEIRO, owned and operated by defendant-appellant, Netumar. The vessel was docked at the south side of Pier 36, East River, and the longshoremen were loading cargo of long steel pipes on deck, in the vicinity of number one hatch (A26-27). The pipes were large, 30 feet long and weighing 1,800 pounds according to plaintiff (A27), and defendant's Port Captain described them as being 40 feet long, 18 inches in diameter, and weighing in excess of 1 ton each (A180).

The pipes were brought aboard the vessel from a lighter offshore by means of ship's winches, two pipes in a draft, using bridles with hooks for each end of each pipe (A27-29). They were being loaded on the inshore deck at number one hatch, into a "crate" (pipe bed) which had been built and completed before the day of the acci-

dent by marine carpenters employed by defendant, New Jersey Export Marine Carpenters, Inc. (A29, A31, A98).

Plaintiff was working at the forward end of number one hatch and his job was unhooking the drafts. After the last draft for the inshore side was landed and the falls were slack, he stepped from the hatch (A43, A94-95) on to the pile of pipe to reach for the hook (A30, 31, 131). He unhooked the first pipe and the pipes had already been unhooked at the after end by another longshoreman, William Brooks (A30, A153, A155-156). Plaintiff testified concerning the accident (A30-31):

"... they land the pipes and I tried to reach, unhook the pipes. I take one hook, one I tried to reach and the next one the pipes move, and I got crushed on my foot, leg, and then I don't know much what goes on because I pull the foot out and scream."

* * *

"... I climb on the pipes, put my left foot in between and I tried to reach my end. And then one of the 2 x 4's or 4 x 4's broke up. The pipes moved and I got crushed."

Plaintiff did not recall the height of the loaded pipe on deck at the time of the accident and the last draft was landed more or less in the center of the stow (A53, 57). Plaintiff further testified that at no time that morning did any of the pipes being landed in the pipe bed strike any of the uprights, (A71), and this was confirmed by the testimony of the hatch boss, James Ratliff (A80, 106).

Hatch boss Ratliff was also standing on top of the hatch when the accident took place and attributed the accident to the weight of the pipes pressing down and out

on the uprights in the pipe bed, which broke, causing the forward end of the pipes to roll and spread out over onto plaintiff's leg and foot (A76, 78, 93). The deck house aft of number one hatch prevented the after part of the pipes from rolling and spreading (A79).

The deposition of Netumar's Port Captain, Richard A. Piper, was read at trial. His duties included coordinating the stowage of all vessels with traffic and bookings, ordering labor, and general supervision of the operations of defendant's vessel on the East Coast (A172). It was his job to lay out the stowage of all outbound cargo and to supervise the loading in conjunction with the Master and Chief Officer of the vessel. They would approve the stowage as proposed by the Port Captain, as would the Stevedore. The Master and Chief Officer would participate in the general loading operation (A173). The Port Captain's job related to the entire flow of cargo at the outports and at New York, coordinating the loading and the unloading in conjunction with the ship's officers (A175). Piper recalled the loading of pipe cargo at Number one hatch and that it was stowed in constructed pipe beds, made by New Jersey Export Marine Carpenters (A179, 181-182). There was substantial divergence in the testimony of Port Captain Piper and the carpenter foreman over who told who what about the cargo to be loaded and the pipe beds to be built. Piper testified that he told the foreman, William Montella, that he had so many pieces of pipe destined for Rio, that had to be stowed on deck because of their size and that Montella should build sufficient bedding to carry the cargo safely (A182). He further said Montella would then determine the size of each bed and the locations available to place the cargo, and that three pipe beds, two at number one hatch, and a third at number two hatch were built (A184). The building of three beds would be the decision of the carpenter

foreman according to Piper, since Piper gave him the full bookings of the vessel and left it up to the carpenter the number of areas he would require in order to stow it safely (A185-186).

William Montella testified that when Mr. Piper ordered the pipe beds, he did not tell Montella how much pipe had to be loaded, the size of the pipe, nor its tonnage (A168), and Montella was not shown a copy of the stowage plan (A234). Montella testified (A169-170):

"Q. All Mr. Piper told you was to build two pipe beds?

A. Correct.

Q. You made no inquiry on this occasion of Mr. Piper as to how much pipe was supposed to go into those beds?

A. Mr. Piper lays out the ship, tells me what he wants. If I told him, Mr. Piper how much pipe do you have, what is the width, what is the tonnage, he would tell me, 'Get the hell out of here.'"

The cargo plan (P-4, document No. 76, A177) called for port and starboard deck stowage in pipe beds (A181), and showed 72 pieces on the cargo plan. For number two hatch, but Montella testified to building only two pipe beds at number one hatch.

Piper would instruct Montella how many men to bring to the vessel (A202), what to bring in, what not to bring in, how much to spend, and was always checking the bills so that money would not be wasted (A236).

When Montella arrived at the scene following the accident he observed the pipe and that it was loaded very high, much higher than the uprights which were standing up (A257-258). Piper's testimony was at variance with this (A308) and the hatch boss Ratliff stated his opinion

it would be bad practice to load higher than the uprights (A114-115, 118).

After the accident, Montella had the pipe bed repaired by nailing in another upright (A207), and loading of the pipes continued by stowing them across the top of the hatch until they were the same height as those in the crib (A133, 134, 137, 167) and pipe was all over the top of the vessel at number one hatch (A168).

Expert testimony was offered by both the defendant, New Jersey Export Marine Carpenters (A268) and third party defendant, I.T.O. the stevedores (A337, 371, 374, 384) to the effect that it was the obligation of the ship's officers or representatives to oversee the construction of the pipe beds made by the carpenters, and to inspect them for suitability upon completion of the construction. No proof was offered at trial of any inspection, or acceptance of the pipe beds by or on behalf of the defendant, Netumar.

POINT I

There was ample evidence presented in the trial to permit the jury to conclude with reason that the defendant shipowner was negligent.

The issue of the sufficiency of the evidence to require that the case be submitted to the jury is governed by Federal law. *Chicago, Rock Island and Pacific Railway Co. v. Howell*, 401 F. 2d 752, 754 (C. A. 10, 1968), cf. *Simler v. Connor*, 372 U. S. 221, 83 S. Ct. 609, 9 L. Ed. 2d 691 (1963). The Federal standard may be found in the following excerpt from the opinion in *Lavender v. Kurn*, 327 U. S. 645, 653, 66 S. Ct. 740, 744, 90 L. Ed. 916 (1946):

"... Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear ..."

In *Lebrecht v. Bethlehem Steel Corp.*, 402 F. 2d 585 (C. A. 2d, 1968), the Court stated at page 589:

"... It is hornbook law that when a motion is made to set aside the verdict, the trial court, as well as the appellate courts, must view the evidence in the light most favorable to the non-moving party, and must give that party 'the benefit of all inferences which the evidence fairly supports even though contrary inferences might reasonably be drawn.' *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U. S. 690, 696, 82 S. Ct. 1404, 1409, 8 L. Ed. 2d 777 (1962)."

The corollary to this proposition was stated by the court immediately preceding the above-quoted excerpt:

"Equally unconvincing is Bethlehem's claim that there was insufficient evidence to support a jury verdict in favor of the plaintiff. Only when there is no 'evidence of substance' upon which reasonable men could reach the result represented by the verdict is the trial judge empowered to set aside the verdict and enter judgment n.o.v. for the moving party. *Binder v. Commercial Travelers Mutual Accident Association*, 165 F. 2d 896 (2d Cir. 1946) ..."

The court in this trial gave the case to the jury under a general charge on the law and the standards to be applied by the jury in determining the facts, together with special interrogatories on the various issues. The standard of review of such a verdict where it is claimed there is error in the result has been stated by the Supreme Court in *Atlantic and Gulf Stevedores, Inc. v. Ellerman Lines*, (1962) 369 U. S. 355, 364, 82 S. Ct. 780, 786, 7 L. Ed. 2d 798 (rehearing denied, 1962, 369 U. S. 882, 82 S. Ct. 1137, 8 L. Ed. 2d 284):

"Where there is a view of the case that makes the jury's answer to special interrogatories consistent, they must be resolved that way. For a search for one possible view of the case which will make the jury's finding inconsistent results in a collision with the Seventh Amendment."

In that case, longshoreman Leighton Beard was injured in the course of discharge of bales of burlap. While being lifted, two bands around a bale broke causing the bale to fall on Beard. The jury found the vessel unseaworthy and the shipowner negligent, and further answered that the fault did not arise from any failure on the part of the stevedore to perform under its contract. The Court of Appeals agreed with the finding of negligence against the shipowner but reversed as a matter of law the finding in favor of the stevedore. The stevedore petitioned for certiorari and the Supreme Court held that neither the Court of Appeals, nor the trial court or the Supreme Court itself could redetermine facts found by the jury, citing the Seventh Amendment. The court stated the issue of the liability of the stevedore was not limited to one specific aspect by the charge to the jury, but included "*the totality of the circumstances*" (82 S. Ct. 785).

In applying these standards to the facts in the instant case, it is to be seen that the jury could have concluded with reason that defendant, Netumar, failed to provide plaintiff with a reasonably safe place to work.

There was no substantial issue made in the trial concerning the fact of plaintiff's accident and injury. The main dispute was among the co-defendants and the third party defendant over the responsibility for the giving way of the wooden pipe bed upright or uprights and the shifting of the pipe cargo.

There was proof received by way of testimony from William Montella that when he saw the stow after the accident, the pipes were higher than the uprights (A258); and James Head testified after the accident the longshoremen resumed loading across the top of the hatch (A133-134). Montella testified that all he was instructed to do in effect was "build pipe beds" (A168). James Ratliff testified that the job of the longshoremen was to load cargo where they were told to (A81). From this testimony the jury could have concluded with reason that the shipowner was negligent in ordering too much pipe to be loaded at that location. This would be consistent with the finding of the jury that the vessel was seaworthy and that the carpenter performed its function in a workmanlike way. It is also consistent with the finding that the stevedore breached its warranty of workmanlike performance—in participating in the loading of too much pipe at the location—and that the shipowner's conduct was sufficient to preclude indemnity—because it ordered too much pipe to be stowed in the first place.

The cargo plan called for port and starboard deck stowage in pipe beds (A181) but Head testified it was also stowed on the hatch. William Montella also testified that his firm only constructed two pipe beds and not three.

from which the jury could conclude that the ship required the 41 pieces on the cargo plan for number one hatch, and the 72 pieces on the cargo plan for number two hatch all were to be stowed at number one hatch overloading that area. The only liability exhibit that the jury asked for was the cargo plan (Tr. p. 607). Defendant argues that there was no evidence of notice to the defendant which would support a finding of negligence, relying on *Rice v. Atlantic, Gulf & Pacific Co.* (484 F.2d 1318 (C.A. 2d 1973)). This argument fails and the theory is inappropriate where there was sufficient evidence from which the jury could have concluded the shipowner *created* the unsafe place to work by ordering too much pipe to be stowed in the first place. The jury could further conclude that this fault was compounded by the lack of proof from the shipowner concerning its acceptance or non-acceptance of the completed pipe bed. It was made clear that the vessel through its pier superintendent, captain and chief officer retained general supervision of the cargo operation, from which the jury could conclude that responsible vessel personnel were present and saw the overloading, or were not present and in attendance when they should have been.

The court is referred to *Van Horn v. Gulf Atlantic Towing Corp.*, 388 F.2d 636 (CA 4th 1968), and particularly page 638:

"On the basis of *Kermarec* and *Halecki*, we hold that federal maritime law, which of course governs this tort action that arose on navigable waters, requires that a shipowner who delivers his vessel to drydock exercise due care under all the circumstances to provide a reasonably safe place to work for those who foreseeably will come aboard to service the vessel. See *Olah v. The S.S. Juladurga*, 343 F.2d 457 (4th Cir. 1965); see also *Norris, The Law of Maritime Personal Injuries*, § 38 (1959).

Gatco's contention that this rule does not apply in the present case because it no longer had control over the vessel is specious. While it is true that Gatco had surrendered control of the barge before the time of the injury, that fact is not decisive of the issue before us because it did have control at the crucial time—the creation of the dangerous condition. Gatco knew in advance of delivery that Colonna's employees would be coming aboard the *Bimbo* to pump its holds and should have foreseen that a slippery surface might prove hazardous to these persons. It was at or before delivery that Gatco had the duty of either having the deck cleaned or at least warning Colonna's employees. In the absence of any steps to avert harm, a cause of action for negligence arises."

There was testimony from more than one witness that as a matter of procedure, the constructed pipe beds should be inspected and accepted on behalf of the ship, but there was no proof that they were in this instance. If the jury concluded there was inspection and acceptance by the vessel, then the jury could posit knowledge of the vessel of the insufficiency of the cribs for the amount of pipe; and if the jury concluded there was no inspection and acceptance, then the vessel failed to determine what it could and should have known: i.e., that the beds were insufficient. I.T.O.'s expert William Wheeler testified concerning the transmission of the weight force of the pipes laterally on the uprights, which would be a matter within the common experience of jurors in any event.

In *Cooper v. D/S A/S Progress*, 188 F. Supp. 578 (D.C. Pa., 1960) plaintiff was injured when a payloader he was operating in a sugar discharge turned over on its side. The jury found specifically that the payloader was not

unseaworthy, and that the vessel was not unseaworthy by reason of any list. The jury did answer "yes" to a further interrogatory (No. 3), which asked "was any unseaworthiness . . . or negligence . . . a substantial factor . . ." The Court in denying the shipowner's motion to set aside the verdict stated at page 586:

"Furthermore, there was testimony concerning the presence of these rock-like or hard lumps or sugar during the trial which was not objected to by counsel for defendants. *Once this testimony became evidence in the case, there was implied consent to try the issues raised by such evidence and they are to be treated as if raised in the pleadings (see first sentence of F.R.Civ.P. 15 (a)).*

The jury may well have found that, although the payloader was a seaworthy device to use in unloading bulk sugar with some hard lumps in it, the ship failed to exercise reasonable care in not removing, by other means, prior to operation of the payloader, the many such hard and large lumps which they found were in this hold from 1:30 to 3:30 in the very cold weather on the early morning of January 17, 1957.

For these reasons, the foregoing Motions will be denied." (emphasis added)

Defendant attempts to argue that since no unseaworthiness was found, it could not be held in negligence, relying on *Spano v. Koninklijke Rotterdamsch Lloyd*, 472 F. 2d 33. This proposition must fall in the face of *Atlantic & Gulf Stevedores Inc. v. Ellerman Lines, supra*. In *Spano*, the court only remarked, parenthetically, "It is hard to imagine, especially on the facts of this case, how an owner could be negligent if the ship was not unseaworthy . . ." (footnote 1, p. 35; emphasis added).

The conflicts in the testimony are for the jury to resolve in arriving at its ultimate conclusion, and in this case the evidence supports the conclusion that the defendant shipowner failed in its obligation to furnish a safe place to work. The law says that this duty cannot be delegated because no one can exempt himself from his own negligence. The vessel owner creates and instigates the cargo carriage operation and only incidentally delegates certain functions to, in this instance, the carpenter and stevedore. It still must perform its functions in the overall operation with reasonable care and avoid the creation or existence of unsafe conditions.

CONCLUSION

The jury verdict was proper in law and fact, and the appeal from the verdict should be dismissed, with costs.

• • •

Cross-Appeal by Plaintiff

Plaintiff filed Notice of Protective Cross-Appeal (A469-470) from those portions of the judgment filed and entered on the jury's verdict on special interrogatories in which judgment was entered in favor of defendant-appellant Netumar on the cause of action for unseaworthiness, and in which judgment was entered in favor of defendant-appellee New Jersey Export on the causes of action for negligence and breach of warranty.

In the event this Court entertains the appeal of the defendant Netumar and vacates the judgment in favor of the plaintiff, plaintiff respectfully urges the Court should also grant a new trial on all issues as to all parties.

Respectfully submitted,

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Of Counsel

No. 74 -1344

JOAQUIM CONCEICAO,
Plaintiff-Appellant,
against

NEW JERSEY EXPORT MARINE CARPENTERS INC., AFFIDAVIT
Defendant and Third Party OF MAILING
Plaintiff-Appellee,
et al.,

BRIEF FOR PLAINTIFF-APPELLEE AND CROSS-
APPELLANT JOAQUIM CONCEICAO

STATE OF NEW YORK,
COUNTY OF NEW YORK,

} ss.:

..... Richard Franks.....
being duly sworn, deposes and says: that he is over twenty-one years of
age; that on the 26th day of June
1974 he served the annexed BRIEF FOR PLAINTIFF-APPELLEE

AND CROSS APPELLANT..... by depositing on said 26th..
day of June....., 1974 2 true copies of said Brief for
Appellee and Cross-Appellant

....., duly enclosed in a postpaid and
sealed wrapper, certified mail, return receipt requested, in an official
post office duly maintained and and operated by the Government of the
United States at Church Street Station, Borough of Manhattan,
New York City, and addressed to:

Larkin, Wrenn & Comisky, Esqs., 11 Park Place, New York, N.Y.
Cichanowicz & Callan, Esqs., 80 Broad Street, New York, N.Y.

Alexander, Ash, Schwartz & Cohen, Esqs., 801 Second Avenue, New
York, N.Y.

.....
that being the address within that State designated by them on the
previous papers in this action as the place where they then kept an
office for the regular transaction of business, between which place-
there then was and now is regular communication by mail.

Sworn to before me this 26th
day of June, 1974.

Edith G. Zwerling

EDITH G. ZWERLING
NOTARY PUBLIC, State of New York
No. 31-15300
Qualified in New York County
Commission Expires March 30, 1975

Richard Franks